DON B. WEEKS

IBLA 95-222 Decided November 18, 1997

Appeal from a decision of the Nevada State Office, Bureau of Land Management, denying a request for extension of time to make final proof in support of a desert land entry and cancelling the entry. N-30326.

Affirmed as modified.

1. Desert Land Entry: Extension of Time--Desert Land Entry: Final Proof

   The BLM properly denies a request for an extension of time to make final proof for a desert land entry, pursuant to section 3 of the Act of Mar. 28, 1908, 43 U.S.C. § 333 (1994), where the entryman is unable to show that failure to reclaim the entered land within the statutory life of the entry is due, without fault on his part, to unavoidable delay in the construction of the necessary irrigating works. It is not sufficient to rely on circumstances that preceded allowance of the entry or financial incapacity thereafter on the part of the entryman.

2. Desert Land Entry: Cancellation--Desert Land Entry: Final Proof

   The BLM properly cancels a desert land entry where the final proof submitted timely by the entryman, along with an examination of the land by BLM, demonstrates that, during the 4-year statutory life of his entry, he failed to construct the necessary irrigating works or cultivate at least one-eighth of the land, as required by the Desert Land Act and its implementing regulations.

APPEARANCES: Don B. Weeks, Monterey, California, pro se.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Don B. Weeks has appealed from a Decision of the Nevada State Office, Bureau of Land Management (BLM), dated January 4, 1995, denying his request

for an extension of time to make final proof in support of his desert land entry (DLE), N-30326, and cancelling the entry.

On June 27, 1980, Weeks filed a DLE application for 320 acres of land situated in the E½ sec. 28, T. 14 N., R. 70 E., Mount Diablo Meridian, White Pine County, Nevada, within the Snake Valley, pursuant to section 1 of the Act of March 3, 1877 (Desert Land Act), as amended, 43 U.S.C. § 321 (1994). He proposed to irrigate all of the land with 1,728 acre-feet of water pumped from a 120-foot-deep well drilled on site and dispensed by means of a sprinkler system and thus to produce alfalfa hay. He asserted that he had proceeded as far as possible toward acquiring a right to the permanent use of sufficient water to irrigate and reclaim permanently all of the land. He estimated that farming would generate an annual income of $115,200, at a cost of $72,800, thus leaving a net profit of $42,400.

When he filed his application in June 1980, the subject land was segregated from appropriation under the agricultural land laws, including the Desert Land Act, by virtue of publication in the Federal Register on June 29, 1967, of BLM notice N-1005 classifying it for multiple-use management pursuant to Subchapter V of the Act of September 19, 1964, as amended, 43 U.S.C. §§ 1411-1418 (1964); 32 Fed. Reg. 9239 (June 29, 1967). See 43 C.F.R. § 2411.2(e) (1967); Bill K. Yearsley, 67 IBLA 97 (1982). The BLM did not reject the application, and on October 11, 1983, the classification was vacated and the land opened to the operation of all of the public land laws effective November 10, 1983. See 48 Fed. Reg. 46105, 46106 (Oct. 11, 1983).

However, prior to the 1967 classification, the subject land had, along with other vacant public lands, also been withdrawn from entry, selection, and location under the nonmineral public land laws. 43 C.F.R. § 2400.0-3(a). Thus, before it could be entered under the Desert Land Act, it had to first be classified as suitable for DLE under section 7 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315f (1994). Accordingly, Weeks' application further served to petition for such classification. See 43 C.F.R. § 2521.2(a); Richard S. Gregory, 96 IBLA 256 (1987).

Thereafter, adjudication of Weeks' application was delayed by a lawsuit filed by the National Wildlife Federation, which culminated in the decision issued by the Supreme Court in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). 1/

On February 26, 1989, BLM classified the land as suitable for agricultural purposes, and it allowed Weeks' entry on March 1, 1990. In its March 1990 Decision, it required Weeks, within 1 year, to obtain from the State a water appropriation permit and to submit a copy to BLM prior to entering onto the lands to drill any wells.

1/ The history of that litigation is set forth in Charlotte Peck, 116 IBLA 169, 174 (1990).

On February 13, 1991, BLM received a copy of a permit (No. 42812) issued by the State to Weeks on June 26, 1990, allowing him to appropriate water from his intended well for use in irrigating the E½ sec. 28. Thereafter, Weeks drilled and completed a well on September 28, 1991.

Weeks filed annual proofs on July 22, 1991, and July 13, 1992, attesting to the expenditure of $20,399.38, primarily for drilling and testing the well and certain components of his irrigation system. The BLM accepted those proofs on August 8, 1991, and October 14, 1992, and in its October 1992 acceptance letter, it expressly notified Weeks that he had "until March 1, 1994, in which to file your final proof." That date was the fourth anniversary date after allowance of his entry and thus the statutory deadline for making final proof. See 43 U.S.C. § 329 (1994); 43 C.F.R. § 2521.6(a); United States v. Jenkins, 11 IBLA 18, 23 (1973).

Thereafter, in a February 7, 1994, letter, BLM required Weeks to submit a notice of his intention to make final proof and specified the process for making final proof and what was required. The BLM stated that Weeks and his two witnesses should be prepared to testify regarding:

> (1) [T]he legal description of the entry; (2) source of water supply, including method by which legal right to the water was acquired, volume, and if a well, the depth, size of casing, size of pump, motor, [and] pump lift * * *; (3) date, nature, location and cost of improvements; (4) crops cultivated and irrigated; (5) acreage in each legal subdivision that has been tilled and irrigated, including dates and duration of irrigation, quantity of water applied per acre, number and carrying capacity of ditches if gravity system is used[;] and any other information pertaining to the development of the entry.

Finally, BLM stated:

> Your final proof must clearly show that all the permanent main and lateral ditches or pipelines have been installed so all the irrigable land can be irrigated. You may be required to have your entire irrigation system operating when a field inspection is made by BLM personnel. Substantial compliance with your plan of irrigation and reclamation will be required.

On March 9, 1994, Weeks filed a notice of intent to make final proof. By letter dated April 15, 1994, BLM notified him that final proof had to be submitted by June 1, 1994, thereby affording him an additional 90 days in which to "submit" final proof, in accordance with 43 C.F.R. § 2521.6(j)(1). It did not afford him an extension of time to make final proof, by constructing the irrigation system or undertaking any other reclamation or cultivation work upon his entry. See Robert B. Arnold, 125 IBLA 158, 164 (1993); Paul I. Kochis, A-30427 (Oct. 26, 1965) at 3.

On May 2, 1994, Weeks filed his final proof with BLM. It was dated April 23, 1994. Therein, he stated that water to irrigate the subject land would be obtained from the well drilled in that area, as appropriated under State water permit No. 42812, which was said to be "in good standing." In addition to drilling and completing the well, Weeks reported that he had purchased and installed various equipment in 1993 and 1994. He stated that the total cost of improvements was $28,530.23. He did not list ditches or pipelines on his final proof. Nor did he attest to the planting and irrigation of any agricultural crops on the land. However, he indicated that all the land was irrigable and being irrigated.

On May 31, 1994, three BLM employee's investigated the site. One of the employees, Rick DePoali, an Operations Range Conservationist, reported:

> Approximately 14 acres of ground had been cleared either partially or completely of brush. Of this, about 6 acres had been recently plowed. A 20 HP pump motor was sitting on the 16[-inch] well casing at the well site. Three phase power is located overhead. It appeared to have power to it through an under ground conduit. The supply pipe was not attached to the water column. Other than a 3/4 inch or one inch PVC line with five hose bibs no other means of delivering water to any of the land was constructed. Numerous parts of wheel lines were scattered about the well site area. An old case tractor and an old ford tractor were parked at the site. Implements at the site included a marker/chisel, a disc, a spring tooth harrow, a spiked toothed harrow, and a small generator.
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> The tilled ground did not appear to be seeded. I searched several areas for sign of planted seed, none were found. The area does not appear to ever have been irrigated.
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> Mr. Weeks arrived and the fact that his time was running out to develop the DLE was pointed out by Mike McGinty. McGinty also stated that to meet the criteria required by law at least 1/8 of the land had to be planted and irrigated and the rest of the land had to have a system to deliver it water. None of this was observed. McGinty informed Mr. Weeks that he had not met the requirements for the final proof but he could apply to the Nevada State Office for an extension of time. Even if Mr. Weeks applies for the extension, the Bureau will still need to have the final proof meeting with Mr. Weeks and two witnesses on June 1, 1994.
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> Looking at the well log indicates that the well is 223 [feet] deep. Static water level is at 184 [feet]. The well was pump tested by Mr. Rhoades at 225 gallons per minute, according to Mr. Weeks.

The record also contains BLM's report of the June 1, 1994, meeting with Weeks and his two witnesses, who were his two grandsons. That report states:

> We met with Mr. Weeks and his two grandsons in the Ely Office. I took testimony from one of the grandsons, a Mr. William Warner. Basically Mr. Warner agreed that the work to prove up on the site had not been done. He did say that his grandfather would have two wheel lines setup on the site within two weeks.
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> Hal took testimony from the other grandson and Mike from Mr. Weeks. A Mr. Gandor from the Baker area sat in on the Weeks interview. At its close Mr. Gandor stated that a minimum 1 second foot of water is needed to irrigate 60 acres of [land]. This requires at least 448 gallons of water per minute. This is the opinion of Mr. Gandor. He has been farming the Baker area all his life. He contended that the existing well belonging to Mr. Weeks is inadequate to irrigate the 320 acres.

Weeks formally requested an extension of time by letter dated June 1, 1994, received by BLM on June 6, 1994. 2/ As the basis for his request, Weeks stated that, though he had been prevented from improving the land for some time, during which the cost to improve increased, he was on the verge of doing so.

In its January 1995 Decision, BLM denied Weeks' extension request, stating:

> [Y]our application for an extension was to include a statement setting forth fully the facts, explaining why the failure to reclaim and cultivate the land within the regular period of four years from date of entry allowed was due to no fault on your part but to some unavoidable delay in the construction of the irrigating works for which you were not responsible and could not have foreseen. Your assertion that you had the monies to improve the land (320 acres) at the time of your application, but the 14-year delay caused an escalation in prices does not qualify as a valid reason for granting an extension.

(Decision at 3.) The BLM also cancelled Weeks' DLE because the final proof that had been submitted, along with BLM's examination, disclosed that he had failed to construct an irrigation system, which could irrigate each 40-acre parcel, and to cultivate one-eighth of the land.

On appeal, Weeks contends that BLM should have granted his extension request. He argues that he deserves an extension in view of the fact that

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2/ One of the grounds given by BLM in its Decision for denying Weeks an extension was that his request had been filed after the statutory life of the entry. That was not a proper basis for denial. This Board has held that a request may be considered timely even where it is filed after the statutory deadline for making final proof. Anna R. Williams, 108 IBLA 88, 90-91 (1989). The BLM Decision is modified accordingly.

he has "tried very hard to comply [with the law]," investing a large amount of time and money, and that it would work a hardship on him to lose that investment. He particularly notes that he made costly improvements to the land that are "necessary in order to work [it]," including bringing in power, drilling and testing a well, and purchasing and installing a pump and wheelline irrigation system. He notes that these improvements were more costly in view of the 10 years it took BLM to allow his entry: "During this time the prices have been going up continuously." He states that, in addition, he has gotten older and that the people who originally were going to help him became discouraged.

[1, 2] Section 1 of the Desert Land Act authorizes the Secretary of the Interior to patent up to 320 acres of desert land to an entryman once he makes satisfactory proof of the reclamation of the land, including the cultivation of one-eighth of the land, and pays the required fee. 43 U.S.C. §§ 321, 328 (1994). The final "proof" entitling the entryman to a patent is required to be made within 4 years after allowance of the entry. 43 U.S.C. § 329 (1994); 43 C.F.R. § 2521.6(a); Wright v. Guiffre, 68 IBLA 279, 280 n.3 (1982), aff'd, No. 83-1148 (D. Idaho June 18, 1984).

Because the Desert Land Act has as its purpose the permanent reclamation of desert land, the proof of reclamation which entitles an entryman to a patent must include a demonstration that, by virtue of construction of the necessary irrigating works, the entryman is in a position to successfully irrigate and reclaim all of the irrigable portions of the land sought, has in fact irrigated and reduced at least one-eighth of that land to cultivation, and has an adequate supply of water to permanently reclaim all of the irrigable portions of the land. 43 C.F.R. § 2521.6(e), (f), and (h)(3); Nathan F. Gardiner, 114 IBLA 380, 383-84, 391 (1990); United States v. Swallow, 74 Interior Dec. 1, 6-7 (1967).

Providing adequate proof, satisfactory to the Department, that an entryman is capable of permanently reclaiming entered land before issuing a patent is a necessity. In Swallow, the Assistant Solicitor stated:

> [I]f an entryman were to receive a patent for land * * * which he would not as a reasonable farmer reclaim after patent, in all likelihood such land would not be reclaimed. If this were to occur, the purpose of the desert land law would be flouted by the very act intended to reward compliance with the terms of the statute.

74 Interior Dec. at 6-7.

Here, Weeks sought an extension to make his final proof. Section 3 of the Act of March 28, 1908, 43 U.S.C § 333 (1994), provides for the first extension of time that may be granted. It authorizes the Secretary to extend for up to 3 years the period to make final proof upon a satisfactory showing that, despite good faith compliance with the requirements of

the Desert Land Act, "because of some unavoidable delay in the construction of the irrigating works intended to convey water to the [entered] lands, [the entryman] is, without fault on his part, unable to make proof of the reclamation and cultivation of said land." 43 U.S.C. § 333 (1994); see also 43 C.F.R. § 2522.3. Basically, an entryman must demonstrate that he has "done all that was possible for him to do to perfect the entry." Charlotte Peck, 116 IBLA 169, 174 (1990), quoting Paul I. Kochis, A-30427 (Oct. 26, 1965) at 4. Further extensions are also available upon similar showings, pursuant to 43 U.S.C. §§ 334, 336 (1994). Charlotte Peck, 116 IBLA at 172.

The case turns on whether, due to no fault on Weeks' part, construction of the necessary irrigating works, and thus reclamation and cultivation of the subject land, was unavoidably delayed during the 4-year statutory life of his entry. He contends that his failure to reclaim the land during that time period was due to the fact that BLM's delay in allowing the entry resulted in a significant increase in the cost of constructing an irrigation system and otherwise reclaiming the land. Appellant has presented no evidence regarding the extent of any increase in that cost at any time after the filing of his application. In any case, even if we assume that it was significant, we are not persuaded that Appellant is thereby entitled to an extension of time to make final proof under section 3 of the Act of March 28, 1908.

In order to be entitled to an extension, an entryman must establish that some circumstance extant during the period of time after allowance of his entry caused him, without any fault on his part, to unavoidably delay construction of the necessary irrigating works, thus rendering him unable to comply with the reclamation and cultivation requirements of the Desert Land Act by the statutory deadline. 43 C.F.R. § 2522.3; Roseanne M. Bell, 120 IBLA 153, 159 (1991); Charlotte Peck, 116 IBLA at 172; Ivan J. Brower, 32 IBLA 286, 287 (1977). Weeks has failed to make such a showing.

Weeks alleges that he has, over the course of time, made a substantial investment in his entry, at least in terms of drilling a well and purchasing the necessary equipment for irrigating the subject land, and that he will suffer a financial hardship by having to plug the well and remove the equipment. However, an extension of time to make final proof for a DLE is not available on the basis of what an entryman has paid in his effort to achieve compliance with the Desert Land Act or what he stands to lose if a request for an extension is denied and the entry cancelled. Rather, he must explain why he was not at fault for failing to construct the irrigating works during the statutory life of his entry and that the failure to do so was unavoidable.

It is well established that an entryman will not be granted an extension to make final proof when the delay in constructing the necessary irrigating works was due to his personal financial inability, dating from allowance of his entry or even arising thereafter, to pay the required costs of doing so. Robert B. Arnold, 125 IBLA at 161.

Weeks has provided no explanation for the delay in purchasing, obtaining delivery, and installing the necessary equipment prior to March 1, 1994. The well was completed in September 1991. Yet, Weeks left himself very little time to obtain delivery of the necessary equipment and then to construct the irrigating works. In the end, delivery did not occur until well after March 1, 1994. Weeks has not explained the immediate cause for the delay in delivery and installation. In any event, he must bear the consequences of waiting until the last moment to take the necessary steps to be able to irrigate and reclaim the land.

In these circumstances, he was not entitled to an extension of time to make final proof since the failure to reclaim and cultivate the land must, in the absence of any reliable evidence to the contrary, be attributed to a lack of diligence. See Thomas D. Hickey, 34 IBLA 86, 93, 96-97 (1978). An extension of time is not available when an entryman "reasonably could have done more than he did to comply." Thomas D. Hickey, 34 IBLA at 93.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed as modified.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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James P. Terry
Administrative Judge